Murphy Brothers, Inc. *and* Communications Workers of America, AFL-CIO. Case 5-CA-14358

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 21, 1982, and an amended charge filed on June 10, 1982, by Communications Workers of America, AFL-CIO, herein called the Union, and duly served on Murphy Brothers, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on July 9, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 28, 1982, following a Board election in Case 5-RC-11279,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about May 14, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 16, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 3, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 10, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

[1] Official notice is taken of the record in the representation proceeding, Case 5-RC-11279, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent submits that the Board's Certification of Representative is invalid due to the Board's erroneous conclusion that the taxicab drivers in the unit found appropriate are employees within the meaning of the Act, rather than independent contractors. In further defense of its position, Respondent contends that the Board erred in failing to set aside the election held in Case 5-RC-11279 based on objections alleging that the Union engaged in violent and coercive conduct during the election campaign. Finally, Respondent contends that substantial factual changes have occurred since the time of the representation case hearings which make the granting of summary judgment improper, and which warrant the relitigation of the representation case issues.

Review of the record herein, including the record in Case 5-RC-11279, reveals that on October 22, 1980, following a hearing on the Union's petition, the Regional Director for Region 5 issued a Decision and Direction of Election in which he found the taxicab drivers in the petitioned-for unit to be employees within the meaning of the Act, and not independent contractors as Respondent contended. On November 4, 1980, the Respondent filed with the Board a request for review of the Decision and Direction of Election in which it alleged, *inter alia*, that the Regional Director erred in concluding that the taxicab drivers were not independent contractors. The Board denied this request by mailgram on December 1, 1980, on the grounds that the Employer had not raised any substantial issues warranting review.

An election conducted by mail between November 17 and December 2, 1980, resulted in 61 ballots cast for and 51 against the Union, with 1 void ballot and 12 challenged ballots. On December 9, Respondent filed timely objections to the conduct of the election and to conduct affecting the results of the election. In its objections, Respondent contested the Regional Director's decision to conduct the election by mail, and asserted that conduct engaged in by the Union had deprived the employees of a free choice. On April 1, 1981, the Acting Regional Director issued a Supplemental Decision and notice of hearing, in which he recommended that the challenges to the ballots of three employ-

ees be sustained and that one of Respondent's objections, relating to coercive conduct on the part of the Union during the campaign, warranted a hearing. Respondent filed exceptions to the Acting Regional Director's Supplemental Decision on April 14, 1981. The Board granted Respondent's request for review as to the recommendation that the challenge to employee Eppard's ballot be sustained, but denied the request in all other respects. The Board remanded the case to the Regional Director directing that the six overruled challenged ballots be opened and counted.

On June 17, 1982, the 6 challenged ballots were counted and the revised tally showed 62 ballots for and 56 votes against the Union, with the remaining challenges no longer sufficient to affect the results of the election. After a hearing was held with respect to Respondent's objection, the Hearing Officer issued his report on objections on December 11, 1981, and recommended that Objection 10 be overruled and the results of the election certified. The Employer filed exceptions to the report on January 4, 1982. The Board adopted the Hearing Officer's recommendations and certified the Union in an unpublished Decision and Certification of Representative issued on April 28, 1982.

By letter dated May 6, 1982, the Union requested Respondent to commence bargaining. By letter dated May 14, 1982, Respondent declined to meet and bargain with the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2] In addition to attempts to relitigate election objections, issues and the Board's initial determination that the taxicab drivers were employees within the meaning of the Act, Respondent alleges the existence of special circumstances which require reevaluation of the unit determination. Specifically, Respondent alleges that changes in the applicable Fairfax County Taxicab Code, certain internal administrative changes, and other operational changes have altered the degree of control Respondent possesses over the drivers, bringing into question the continuing validity of the Board's certification of the Union as bargaining representative.[3]

The Board will reexamine a prior certification where the "essential factor[s]" upon which the Board has based its earlier unit determination were eliminated due to the employer's reorganization of its operations.[4] Respondent here has not alleged changes in its operations which constituted essential bases upon which the Regional Director and the Board concluded that the taxicab drivers were "employees" and not independent contractors. As to the revisions of March 15, 1982, in the Fairfax County code, Respondent merely asserts, in its opposition to counsel for General Counsel's Motion for Summary Judgment, that certain requirements and procedures heretofore mandatory were altered. Respondent in no way elucidates how those revisions affect its day-to-day operations and we cannot presume, without more, that the revisions call into question our original determination. Furthermore, in his Decision and Direction of Election the Regional Director explicitly recognized that the Employer conformed its operations only loosely with the pertinent county regulations.

As to the internal administrative changes instituted by Respondent, Respondent alleges it altered its lease agreement "to make sure that the drivers [know] they [are] independently responsible" for insuring against the first $200 of property damage to Respondent's vehicles. This change was clearly a change in appearance rather than form, serving to clarify preexisting obligations rather than to effect a substantial alteration in the respective responsibilities for providing insurance coverage. Respondent alleges further that it altered its disciplinary procedures and dress code. Again, these changes do not affect the essential bases upon which the original determination was made.

In sum, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein (other than those discussed and disposed of above) which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respond-

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] As further evidence of the need to reexamine the Board's certification, Respondent also points to a "300 degree turnover" among its work force since the Decision and Direction of Election. The Board has long held that the factor of employee turnover does not establish that the union has lost its majority status. *Dynamic Machine Co.*, 221 NLRB 1140, 1142 (1975); *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484 (1965), enforcement denied on other grounds 359 F.2d 799 (7th Cir. 1966). Furthermore, new employees are presumed to support the Union in the same ratio as those whom they have replaced. *Id.* Finally, employee turnover does not constitute "unusual circumstances" within the Supreme Court's decision in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). See also *Sure-Tan, Inc. and Surak Leather Co.*, 231 NLRB 138, 139 (1977).

[4] *Frito-Lay, Inc.*, 177 NLRB 820 (1969).

[5] Respondent's refusal to admit complaint allegations that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning Sec. 2(5) of the Act constitutes an attempt to relitigate findings of fact and conclusions of law made with respect to those issues in Case 5-RC-11279.

ent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[6] Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Employer is a Virginia corporation located at 11 Hillwood Avenue, Falls Church, Virginia, engaged in the operation of a taxicab business. During the past 12 months Respondent's gross volume of business was in excess of $500,000 and it purchased and received products valued in excess of $5,000 directly from points located outside the Commonwealth of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All owner/drivers and full-time regular part-time lease drivers employed by the Employer at its Falls Church, Virginia location excluding all other employees, dispatchers, mechanics, office clerical employees, supervisors and guards as defined in the Act.

2. The certification

Pursuant to a secret-ballot election conducted by mail between November 17 and December 2, 1980, a majority of the employees of Respondent in said unit, under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 28, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 6, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 14, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 14, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as

[6] Respondent's refusal to admit service of the charge and amended charge fails to raise an issue of fact warranting a hearing. Uncontroverted affidavits of servicce and post office receipts attached to the Motion for Summary Judgment are sufficient to establish service.

the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Murphy Brothers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All owner/drivers and full-time regular part-time lease drivers employed by the Employer at its Falls Church, Virginia, location excluding all other employees, dispatchers, mechanics, office clerical employees, supervisors and guards as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 28, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 14, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Murphy Brothers, Inc., Falls Church, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All owner/drivers and full-time regular part-time lease drivers employed by the Employer at is Falls Church, Virginia location excluding all other employees, dispatchers, mechanics, office clerical employees, supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its office at 11 Hillwood Avenue, Falls Church, Virginia, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Communications Workers of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All owner/drivers and full-time regular part-time lease drivers employed by the Employer at its Falls Church, Virginia location excluding all other employees, dispatchers, mechanics, office clerical employees, supervisors an guards as defined in the Act.

MURPHY BROTHERS, INC.